PELANGI ENTERPRISES SDN BHD

v.

OH SWEE CHOO & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[APPLICATION NO: R1-25-33-2001]
15 JANUARY 2004

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - To quash award of Industrial Court - Whether first respondent entitled to consider herself constructively dismissed - Whether Industrial Court had erred in law - Whether compensation awarded ought to be reduced - Whether award perverse or unreasonable and warranted intervention*

This was an application by the applicant for an order of *certiorari* to quash the Industrial Court's decision that the first respondent was entitled to treat herself as being constructively dismissed, and ordering the applicant to pay the first respondent backwages and compensation amounting to RM222,855. The applicant was the operator of Taman Desa Medical Centre ('TDMC'), and the first respondent, who was 53 years of age at the material time and a state-registered nurse, joined TDMC as a General Manager. One Dr. Wong, in his capacity as Managing Director, had signed the first respondent's offer of employment. Upon the first respondent's confirmation, TDMC offered to sponsor the first respondent for a part-time two-year course that would lead to a Masters of Science in Healthcare Management. The first respondent would be obliged to serve TDMC for three years upon completing the course, by which time she would be 56 years of age.

About ten months after the first respondent and TDMC entered into the sponsorship agreement, TDMC underwent changes in management. The first respondent received a letter informing her that she had to retire upon reaching her 55th birthday in accordance with the "service regulations for confirmed employees" and freeing her of any obligation to serve the applicant upon completion of her Masters of Science course, with the letter containing the sponsorship agreement treated as cancelled. The applicant later issued a letter entitled "re-employment" offering the first respondent employment contractually as "General Manager (Marketing and Special Projects)" on a monthly basis for a maximum of 12 months. The first respondent did not accept the terms of this letter; the applicant sent her another letter of re-employment. The first respondent considered herself as having been constructively dismissed and filed

a a complaint under s. 20 of the Industrial Relations Act 1967 resulting in the Industrial Court's decision and the present application on the ground that the Industrial Court had erred in law.

Held (dismissing the application):

b **[1]** The Industrial Court was satisfied that the first respondent had succeeded in proving that the applicant's conduct was a serious breach of her contract of employment when the applicant had purported to retire the first respondent on reaching 55 years of age in the absence of any such clause in her contract of employment. The Industrial Court was also c satisfied that the first respondent had left the applicant's services in response to the aforesaid breach by the applicant and had acted at the appropriate time. On the facts, the Industrial Court had not committed any error that justified intervention by this court. (pp 165 g & 166 c & g)

[1a] Since the applicant's case was that the first respondent had purportedly d reached the "statutory age of 55 years" and was contractually obliged to retire at the age of 55, the burden of proof rests on the applicant to prove the existence of such a contractual clause or statute and that it was binding on the first respondent. The applicant, however, had failed to do so. (p 167 c)

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[1b] The first respondent's evidence that she was assured by Dr. Wong that she did not have a retirement age was not hearsay evidence. The Industrial Court had made a finding of fact and this court had no reason to disturb such a finding in a judicial review. No doubt, the first f respondent had attempted to subpoena Dr. Wong to support her testimony; however, this did not in any way absolve the applicant from discharging its burden of proving the retirement age as a term of contract, which it had evidently failed to do. (pp 167 f & 168 c)

[2] This court did not agree with the applicant's submission that the Industrial g Court had erred in law and misconstrued the content and effects of exhs. CLE 7 and COE 17 (the "Employees' Handbook") and "Confirmed Employees Service Regulations Handbook" respectively. The Industrial Court had made findings of fact that the first respondent had a hand in the collective effort of preparing the contents of CLE 7 and that at the h time the first respondent had left the applicant, COE 17 was not in existence as a document and CLE 7 had not been issued. The Industrial Court also found that the first respondent could not be deemed to be

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bound by those provisions in CLE 7 and COE 17 and neither was it equitable nor in good conscience to hold that there existed an implied term that the first respondent must retire at 55 years of age. (p 170 c-d)

[3] The sponsorship agreement clearly stated, "… on completion of the course, you will be obliged to serve the company for a period of three years (bonded period) in an appointment to be determined by the Medical Centre which will not be lower in rank than your present appointment". It was undisputed that at the date the applicant had attempted to forcibly 'retire' her, the first respondent had still not completed her Masters of Science in the Healthcare Management course. Furthermore, evidence was led by the first respondent to show that the two subsequent letters of re-employment offered to the first respondent by the applicant contained less favourable terms and conditions of employment and, therefore, were rejected by the first respondent. The Industrial Court consequently made a finding of fact that the two letters of 're-employment' offered less favourable terms. Thus, this ground also did not disclose any error of law justifying intervention by way of judicial review. (p 171 e-g)

[4] Without doubt, although there was a considerable delay in concluding this case, it could not be a reason to further reduce an award of the Industrial Court since none of the delays were caused by the first respondent. The first respondent, like the applicant, must have been equally frustrated with the delays and also had to patiently wait for the case to be disposed of. In any event, the Industrial Court had already reduced backwages due to the first respondent by 30% on account of her post-dismissal employment. Therefore, there was no valid reason in law for the applicant to seek this court to further reduce the amount of backwages payable to the first respondent. (p 172 f-h)

[5] The learned chairman's finding that the first respondent had been constructively dismissed in this case was a finding of fact, based on the totality of evidence adduced before him without taking irrelevant matters into consideration. The award was neither perverse nor unreasonable and the grounds of challenge raised by the applicant did not disclose any error of law warranting this court's intervention by way of judicial review. (p 173 a, c-d)

Case(s) referred to:

Booi Kim Lee v. YB Menteri Sumber Manusia & Golden Plus Geaniait SB [1999] 4 CLJ 121 HC ***(refd)***

Council Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

HSS Integrated Sdn Bhd v. Lew Yew Onn [2000] 3 ILR 31 ***(foll)***

Malayan Banking Bhd v. Association of Bank Official, Peninsular Malaysia & Anor [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Swedish Motor Assemblies Sdn Bhd v. Hj Mohd Ison Baba [1998] 3 CLJ 288 CA ***(refd)***

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101

Industrial Relations Act 1967, s. 20

For the applicant - T Thavalingam; M/s Zaid Ibrahim & Co

For the respondent - LG Seah; M/s Lobo & Assocs

Reported by Suresh Nathan

JUDGMENT

Raus Sharif J:

This is an application by the applicant for an order for *certiorari* to quash the decision of the Industrial Court in Award No. 115 of 2001 dated 23 February 2001. The Industrial Court held that Oh Swee Choo (the first respondent) was entitled to treat herself as being constructively dismissed and ordered the applicant to pay the first respondent back wages of 44 months from 9 November 1996 to 2 July 2000 totaling RM191,730. The Industrial Court also ordered the applicant to compensate the first respondent *in lieu* of reinstatement a one month's salary for every year of service from 1 February 1995 to 2 July 2000 totaling RM31,125. Thus, the total sum ordered by the Industrial Court due and payable to the first respondent was RM222,855.

The factual background giving rise to this application are as follows:

The applicant, Pelangi Enterprises Sdn. Bhd. was the operator of Taman Desa Medical Centre (TDMC) located at Jalan Kelang Lama, Kuala Lumpur. The idea of setting up the TDMC was conceived by Dr. Ismail Abdul Rashid sometime in early 1993. Dr. Ismail had requested a friend by the name of Dr. Wong Wai Peng (Dr. Wong) to help him and established the TDMC. The first

respondent, joined the services of TDMC in 1995 in the capacity of General Manager. At that material time, she was 53 years of age and was a state registered nurse by profession. She had served the government from 1961 to 1991 and optionally retired at the age of 50. After retirement, she was employed by Pantai Medical Centre from 1 November 1991 up until January 1995, thereafter commenced employment with the applicant's company effective 1 February 1995.

The first respondent's offer of employment dated 1 February, 1995 was signed by one Dr. Wong in his capacity as Managing Director of TDMC. It was a two page document outlining the first respondent's terms and conditions of employment. Clause 9 (Rules & Regulations) of the offer letter expressly provides as follows:

> Your appointment shall be governed by the Service Regulations for Confirmed Employees of this Medical Centre.

The first respondent was confirmed in her appointment with effect from 1 May 1995. Subsequently, by letter dated 13 July 1995, TDMC offered to sponsor the first respondent a part-time two year course leading to the Master of Science in Healthcare Management awarded by the University of Wales, Swansea. Under the terms of the sponsorship, TDMC would pay for the course fees including the examination fees. In addition to this, the first respondent was to continue working full time for TDMC and to be paid her monthly salary and allowances as usual (the course was conducted locally and classes were held in the evenings). It was also an express term of the sponsorship letter that the first respondent will be obliged to serve TDMC for three years on completion of her course (which was due to be completed in April 1997), by which the first respondent would be 56 years old.

About 10 months after the first respondent and TDMC entered into sponsorship, TDMC underwent changes in the management through a notice issued by Dr. Ismail Rashid dated 21 May 1996. Due to the changes, the first respondent has to resign from TDMC effective 1 June 1996 and accepted re-employment with the applicant, now called Pelangi Enterprises Sdn. Bhd. with immediate effect and without any loss of benefit under her earlier terms of employment. However, on 11 October, 1996, the first respondent received a letter dated 7 October 1996 informing her that she has to retire on reaching her 55th birthday in accordance with the "service regulations for confirmed employees" and freeing her of any obligation to serve the company on the completion of her Master of Science course and treated its letter of 13 July 1995 (the sponsorship agreement) as cancelled. On 31 October 1996 (which was on the first respondent's birthday), the applicant issued a letter titled "re-employment"

offering the first respondent employment on a contractual basis as "General Manager (Marketing and Special Projects)" on a month to month basis for a maximum of 12 months. In reply, the first respondent in a letter dated 16 October 1966 requested the applicant to revoke its letter dated 7 October 1996. Subsequently, on 5 November, 1996 she sent another letter in which she stated that she was unable to sign and accept the terms as contained in the applicant's letter dated 31 October, 1996 and requested that the letter dated 7 October 1996 and 31 October 1996 be withdrawn by 8 November 1996 failing which she would consider herself dismissed by the applicant as at 9 November 1996. The applicant did not reply to her letter but instead sent her another letter of re-employment dated 7 November 1996. The first respondent then, in a letter dated 8 November 1996, treated herself having been constructively dismissed from the applicant effective from 9 November 1996. The said letter states as follows:

> Oh Swee Choo
> c/o Taman Desa Medical Centre
> Jalan Desa, Taman Desa.
>
> 8.11.1996
>
> The Executive Chairman
> Taman Desa Medical Centre
> Jalan Desa, Taman Desa
> Off Jalan Kelang Lama
> 58100 Kuala Lumpur.
>
> Dear sirs,
>
> I refer to my letter dated 5.11.1996 and your letter dated 7.11.1996 on my employment with the Company.
>
> Since you have not complied with my request in my letter of 5.11.1996 but **instead gave me a slightly different letter of re-employment**, I have no alternative but to consider myself dismissed by the Company with effect from 9.11.1996.
>
> Yours sincerely,
>
> Oh Swee Choo
> …
>
> c.c.
> Dr. Wong Wai Peng

The first respondent thereafter, filed a complaint before the Industrial Relations Department pursuant to s. 20 of the Industrial Relation Act 1967 ('the Act'). Subsequently, the Honourable Minister of Human Resource referred the complaint to the Industrial Court. The complaint was registered as Case No. 2/4-419/97. On 23 February 2001 the Industrial Court handed down an award in favour of the first respondent as stated earlier. The applicant is now seeking to quash the whole award for errors of law.

The principles on judicial review is well settled. The Supreme Court in *Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 held that:

> Judicial Review is not an appeal from a decision but a review on the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider the decision itself, on the merit of the facts, was fair and reasonable.

In *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia Malaysia & Anor*. [1998] 1 CLJ 227, Shaik Daud JCA, said at p. 232:

> First and foremost, it must be emphasized that in an application for *certiorari*, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision making process and not the decision itself.

In *Booi Kim Lee v. Y.B. Menteri Sumber Manusia & Golden Plus Geaniait SB* [1999] 4 CLJ 121, Justice KC Vohrah adopted Lord Diplock's classification of grounds of judicial review in the House of Lords case of *Council Unions v. Minister for the Civil Service* [1985] AC 374. The three grounds described by Lord Diplock are "illegality", "irrationality" and "procedural impropriety".

With the above principles in mind, I shall now consider the grounds mounted by the applicant.

First Ground Of Challenge

The applicant's first ground of challenge revolves around the purported oral assurances made by Dr. Wong to the first respondent prior to her commencing employment with the applicant. In the course of its award, the Industrial Court held as follows:

> A perusal of the claimant's letter of offer of employment 'CLE 1' disclosed that there is no specific provision nor express clause regulating the age of retirement therein. However, her age of birth is clearly stated on the top left hand of CLE 1. CLE 1 is signed by Dr. Wong Wai Peng as Managing

Director, Taman Desa Medical Centre, the very same person who had interviewed the claimant for the job. **This court accepts the claimant's evidence that she was told by Dr. Wong Wai Peng during the interview that there would not be any retirement age**. (emphasis added).

The Industrial Court further held as follows:

This Court is satisfied from the evidence that the general age of retirement in the Company is 55 years but that Dr. Wong did, in fact, give claimant such an assurance and that he was action for and on behalf of the Company and he had authority to do so. This Court finds that the assurance given by Dr. Wong was instrumental to the claimant accepting the offer of employment CLE 1. It was a clarification given by Dr. Wong since CLE 1 did not contain any provision pertaining to retirement. This reinforces the contention that the claimant was not to retire at the age of 55 years. *This Court is further satisfied that the issue of retirement was pleaded by the claimant in paragraph 3.2 of her statement of case and accepts that evidence in regard to thereof be tendered in Court.* (emphasis added).

It is the submission of the applicant that the first respondent had failed to substantiate her claim that Dr. Wong had informed her during the course of her interview prior to her commencing employment that she did not have a retirement age. This is because according to the applicant, the first respondent failed to produce Dr. Wong as her witness before the Industrial Court to substantiate the same. Thus, according to the applicant her testimony was essentially based on hearsay evidence and as such there was no evidence on this issue to justify the Industrial Court in coming to the finding that 'Dr. Wong did in fact, give the claimant an assurance as such'. This in itself, as submitted by the applicant, is an error justifying intervention by this court.

The applicant further submitted that Dr. Wong's purported statement at the interview in January, 1995 and that the first respondent had no retirement age was not pleaded in the first respondent's statement of case. Thus, the applicant contended that in reaching a decision in accepting the first respondent's hearsay evidence on Dr. Wong's purported assurance and holding that the issue of retirement was pleaded in para. 3.2 of the statement of case, the Industrial Court committed errors of law and exceeded its jurisdiction for the following reasons:

(a) it failed to appreciate that the burden of proof in claims for constructive dismissal lies on the aggrieved worker, that is, the first respondent in the instant case and the first respondent had failed to discharge such a burden;

(b) it came to its decision based on hearsay evidence which was not supported by any proof;

(c) it took into account irrelevant considerations particularly the unsupported oral averments of the first respondent that Dr. Wong had informed her during her interview that there was no retirement age for her; and

(d) it erred in law when it took into account unpleaded matters/facts particularly the bare and unsubstantiated averment of the first respondent that Dr. Wong had informed her that she had no retirement age.

With due respect, I am unable to agree. I am of the view that the Industrial Court did not run foul of the principles that the burden of proof in a claim for constructive dismissal lies on the aggrieved workman that is the first respondent in the instant case. However, there are two burdens of proof involved in this case. The first burden of proof is the onus of proving that the first respondent was constructively dismissed by the applicant. The second burden of proof is the burden of proving that the first respondent was bound by a compulsory retirement age of 55 years under the terms of her contract of employment.

The first burden of proof is the onus of proving that the first respondent was constructively dismissed by the applicant. The onus of proof rests on the first respondent who has to prove the following elements:

(i) that the applicant's conduct as such is guilty of a breach which goes to the root of the contract or evinced an intention no longer to be bound by it;

(ii) that the first respondent had made up his mind and had acted at the appropriate time soon after the conduct of which the complaint had taken place;

(*Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298.

In this regards, the Industrial Court was satisfied that the first respondent had succeeded in proving the above two elements. The Industrial Court was satisfied that the applicant's conduct was a serious breach of her contract of employment when the applicant had purported to retire the first respondent on reaching 55 years of age, in the absence of any retirement age of 55 years in her contract of employment. The Industrial Court said at para. 21 of the award as follows:

21. In regard to paragraph 20 (a) and (b) above, this Court finds that the Company, in purporting to unilaterally retire the claimant at 55 years in the absence of an express term allowing the Company to do so, did commit a breach of the claimant's contract of employment. The court finds this breach to be a fundamental breach going to the root of the contract. To retire an employee in breach of contract is to deprive that employee of his right to continue to earn a living. As enunciated by the Court of Appeal in the case of *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1996] 1 MLJ 481 at page 510 per Dato Gopal Sri Ram:

> Suffice to say that the expression 'life' appearing in Article 5(1) of the Federal Constitution is wide enough to encompass the right to livelihood.

The Industrial Court was also satisfied that the first respondent had left the applicant's services in response to the aforesaid breach by the applicant and had acted at the appropriate time. The Industrial Court stated as follows:

22. In short, by issuing CLE 8; CLE 10 and CLE 13; the Company evinced an intention not to be bound by CLE 1. This Court finds that the claimant did leave the Company which leaving was in response to the Company's breach thereby fulfilling paragraph 20 (c) above.

23. In regard to 20 (d) above, this Court also finds that the claimant did not delay in treating herself as having been constructively dismissed. The claimant has given a cogent explanation in her evidence as regards the Company's letter CLE 8 dated 7.10.1998. Upon receiving CLE 8 she went to see Dr. Wong Wai Peng. He was equally shocked and he told her not to sign anything, to ignore CLE 8 that he would bring it up to the Board that everything was OK. At the Management Meeting on 16.10.1996 COW 1 said "everything is back to normal no one needs to cry." Which the claimant took to mean that she could carry on working. Her letter claiming constructive dismissal CLE 14 is dated 8.11.1996, and it came a day after the Company's second letter offering reemployment CLE 13. In the circumstances this Court find no delay, on the part of the claimant in claiming constructive dismissal.

To me, the Industrial Court had not committed any error to justify intervention of this court.

The second burden of proof is the burden of proving that the first respondent was bound by a compulsory retirement age of 55 years under the terms of her contract of employment. I am of the view that burden or onus of proof on this issue rests on the applicant because it is the applicant who sought to rely on the existence of such contractual terms in its case before the Industrial Court. The authority for this proposition is found in s. 101 of the Evidence Act 1950 which provides:

Section 101: Burden of Proof

(1) Whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person.

To me, since the applicant's case is the first respondent's had purportedly reached the "statutory age of 55 years" and was contractually obliged to retire at 55 years of age, the burden of proof rests on the applicant to prove the existence of such contractual clause or statue binding on the first respondent. I find that the applicant had failed to do so. In this respect, the Industrial Court had applied the law correctly and had correctly followed the case of *HSS Integrated Sdn. Bhd. v. Lew Yew Onn* [2000] 3 ILR 31 where the following was stated:

… It is not disputed that the terms of compulsory retirement at the age of 55 does not exist in the claimant's contract of employment. It is therefore, incumbent upon the company to prove that the claimant had agreed to the imposition of his new term since it is settled law that one party to the contract cannot vary or modify the term of the contract without the agreement consent of the other party.

The next issue is did the Industrial Court act on hearsay evidence? I am of the view that the Industrial Court did not act on hearsay evidence. The evidence of the first respondent that she was assured by Dr. Wong that she did not have a retirement age is not hearsay evidence. The following passage from *"Cross on Evidence"* (Butterworths) Seventh Edition explain the legal position:

… Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact it was made.

In our present case the first respondent had testified that Dr. Wong told her during the interview before she joined the services of the applicant that there was no retirement age for her. In its award, the Industrial Court made the following findings:

… The claimant asserts that Dr. Wong Wai Peng told her during her interview that there was no retirement age. The claimant did attempt to call Dr. Wong to give evidence. But Dr. Wong tore the subpoena CLE 12 into two, when service was attempted on him by the claimant's son COW 2. This court is satisfied from the evidence that the general age of retirement in the Company

> is 55 years but that Dr. Wong did in fact give the claimant such an assurance and that he was acting for and on behalf of the Company and that he had authority to do so. This Court finds that the assurance given by the Wong was instructed in the claimant accepting the offer of employment CLE 1. It was a clarification given by Dr. Wong since CLE 1 did not contain any provision pertaining to retirement. This reinforces the contention that the claimant was not to retire at the age of 55 years …

To me, the Industrial Court, has made a finding of fact. This court has no reason to disturb such finding bearing in mind this is a judicial review. No doubt, the first respondent attempted to subpoena Dr. Wong to support her testimony, but this does not in any way, absolve the applicant of discharging its burden of proof on the retirement age as a term of contract, which it had evidently failed to do.

I am also unable to hold that the first respondent had failed to plead the facts regarding her retirement age. In connection with this issue, the Industrial Court had found as follows:

> This Court is further satisfied that the issue of retirement was pleaded by the claimant in paragraph 3.2 of her statement of case and accepts that evidence in regard to therefore, be tendered in Court …

I have no reason to disagree. The object of pleadings is to prevent one's opponent from being taken by surprise. The applicant in the instant case cannot possibly claim that it had no idea or was taken by surprise by the first respondent's contention that there was no retirement age of 55 years in her contract.

Thus, to me the first ground of challenge by the applicant is clearly without merit.

Second Ground Of Challenge

The applicant second ground of challenge is in respect of the retirement age clause contained in the "Employee's Hand Book". The Industrial Court in coming to its decision had referred to two exhibits that is CLE 7, (the Employees Hand Book) and COE 17 ("Confirmed Employees Service Regulation Handbook"). In regards with the two exhibits the Industrial Court made the following findings:

> That it stood to reason that an important document like CLE 7 which laid down the "Employment Policies", "Compensation and Benefit" and other important Conditions of Employment needed more than just the approval of the General Manager, it was logical that the approval of the Board of Directors was needed before it could be issued;

> That CLE 7 had been issued at the time of the claimant's leaving the Company; and
>
> Thus, in accordance to Para 12(b) above, the claimant therefore, cannot be deemed to be bound by those specific provisions and express conditions found in CLE 7 and COE 17 which state that all employees shall retire on attaining the age of 55 years, nor does this Court find it equitable or in good conscience to hold that there exists an implied terms that the claimant must retire at the age of 55 years.

The applicant contends that in reaching such findings, the Industrial Court had failed to have regard to the evidence before it in particular the testimony of Dr. Ismail Abdul Rashid (COW1) who confirmed that there was no need for the Board's approval before CLE 7 could be issued. Further exh. CLE 7 was expressly approved by the first respondent on 1 September 1996 and the document is silent on a further approval by the Board before it could be issued and this material fact of the purported need for the Board's approval was also not pleaded by the first respondent in her statement of case. In the circumstances, the applicant contends that the Industrial Court had acted on an incorrect basis of fact and had erred in law and misconstrued the content and effect of exhs. CLE 7 and COE 17.

In support of the above, the applicant relies on the Court of Appeal in *Swedish Motor Assemblies Sdn. Bhd. v. Haji Mohd. Ison bin Baba* [1998] 3 CLJ 288 where at p. 295 the Court of Appeal held *inter alia* as follows:

> Counsel for the applicant submitted that the notes of evidence in enclosure 6 does not record any evidence of the applicant having admitted that he had signed the resignation letter and agreement on his own accord. There was however, no submission in reply on this point by learned counsel for the respondent. After perusing the applicant's testimony, I with respect, agree with the applicant's counsel's submission. There is nothing in the evidence to show that the applicant ever said that he did sign the documents on his own accord. Neither is there evidence to support the finding that; 'His evidence on a balance of probability that he did not know what he signed'. On the contrary, there is evidence to say that the applicant had read the document before he signed when he said at page 16 para C in enclosure (6); 'I had read it carefully before I signed'. But under cross-examination by counsel for the respondent at page 15 Para C in enclosure (6), he replied: 'I did not sign voluntarily'. *This piece of evidence cannot be ignored. With such evidence before the Court, the findings of the learned Chairman cannot be said to be reasonable and justified. It is duty of the Industrial Court to scrutinize the evidence before it with utmost care and to do that, it must at all times keep itself alert to the issues and attend to matters it is bound to consider (R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147). It is obvious in this case that the Industrial Court had failed to investigate*

> *and analyse the facts properly before him. Had he done so, his conclusion would have been different. To find that the applicant had signed the documents on his own accord without supporting evidence is indeed perverse. By such finding, the Industrial Court had acted on an incorrect basis of fact on an issue which goes to the very crux of the applicant's case,* that is whether the applicant had voluntarily resigned or was dismissed, therefore, there is a clear error of jurisdiction committed by the Industrial Court when it made the findings which are contrary to the recorded evidence. Accordingly, the findings are perverse. (emphasis added).

I am unable to agree with the applicant's submission that the Industrial Court had erred in law and misconstrued the content and effect of exhs. CLE 7 and COE 7. It must be firstly be noted the Industrial Court had made a finding of fact that the first respondent had a hand in the collective effort to prepare the contents of CLE 17. The Industrial Court also made a finding of fact that at the time the first respondent left the applicant on 8 March 1996, COE 17 as a document was not in existence and exh. CLE 7 had not been issued. The Industrial Court also found that the first respondent cannot be deemed to be bound by those provisions in CLE 7 and COE 17, nor is it equitable or in good conscience to hold that there exists an implied term that the first respondent must retire at 55 years of age.

I have no reason to disagree with the above findings. The Industrial Court in fact, did consider the evidence of COW 1 but rejected it after weighing the other surrounding evidence.

I am also of the view that since it was the applicant who was seeking to establish as part of its case that CLE 7 was a 'final version' and did not need the Board's approval, it is for the applicant to plead as such in its pleading and not the first respondent to do so, as suggested by the applicant. Therefore, the applicant's second ground of challenge is also without merit. The case of *Swedish Motor Assemblies* cited by the applicant is irrelevant to the issue raised.

Third Ground Of Challenge

The applicant's third ground of challenge is in respect of the Industrial Court's interpretation of the applicant's letter dated 13 July 1995 in relation to the first respondent sponsorship for post-graduate studies. The Industrial Court in the course of its award made the following findings:

> The claimant was born on 31st October, 1941. Thus, when she started the course on 28th April, 1991, she was about 53 years 6 months. This meant that when she completed the course she would be 55 years 6 months (not 56 years as stated by the claimant in evidence, nor 56 + as submitted by her counsel), and 58 years 6 months after she completed her bond. This clearly indicates that on the date of CLE 3, that is 13th July, 1995 (which is roughly 5 months after she joined) it was understood by the parties that she would work for the company at least up to the age of 58 years 6 months. This in relation to paragraphs 12(d) above clearly demolished any argument that she had to retire at 55 years. The company cannot unilaterally blow hot by binding her to work till she is 58 years 6 months and then blow cold by forcing her to retire at the age of 56 years.

It is the applicant's submission that the letter dated 13 July 1995 had bonded the first respondent to work for it in "an appointment to be determined by the Medical Centre" and that it was merely 'giving effect to the terms and conditions' by retiring her and thereafter, offering her continued employment on a contractual basis.

As argued by the respondent, the submission is without basis. The clause of the sponsorship agreement clearly states, "… on completion of the course, you will be obliged to serve the company for a period of three (3) years (bonded period) in an appointment to be determined by the Medical Centre which will not be lower in the rank than your present appointment". It is undisputed that at the date the applicant attempted to forcibly 'retire' her thus leading to her claim to constructive dismissal with effect as on 9 November 1996, the first respondent had still not completed her Masters of Science in Healthcare Management Course. Furthermore, evidence was led by the first respondent to show that the two subsequent letters of re-employment offered to the first respondent by the applicant contained less favourable terms and conditions of employment and therefore, were rejected by the first respondent. The Industrial Court consequently made a finding of fact that the two letters of 're-employment' offered were in fact on less favourable terms.

Thus, I am also of the view that this ground does not disclose any error of law justifying intervention by way of judicial review.

Final Ground Of Challenge

The applicant's final ground is the manifest unreasonableness in the award of back wages awarded in favour of the first respondent. This relates to the Industrial Court's award of back wages for the total duration of 44 months, totaling to RM273,000. Although an adjustment was made by reducing the quantum by 30% and making the sum awarded to RM191,730, the applicant submit that the sum awarded was erroneous as it goes against the very policy, objective and general scheme of the Act.

The complaint by the applicant is that, the Industrial Court in awarding the maximum quantum of back wages, had failed to appreciate that the delays in this matter had nothing to do with the applicant. The applicant lists down the sequence of events that contributed to the delays as follows:

(a) The matter was referred to the Industrial Court *vide* a reference from the Honourable Minister of Human Resources dated 13 August 1997.

(b) The case came up for hearing almost two years later on 5 May 1999.

(c) On 7 May 1999, after hearing the evidence of the first respondent and the applicant's first witness, the learned Chairman of the Industrial Court decided to transfer the case to another division of the court.

(d) The matter was mentioned before a new Chairman on 26 May 1999 who decided to hear the case de novo and hearing dates were fixed consecutively on 1 and 2 November 1999. However, the learned Chairman, after having reviewed the file, found the matter to be highly contentious. As he was due to retire very soon, this Chairman too declined to hear the matter as he had to clear all his part-heard cases.

(e) The matter was finally heard de novo before yet another Chairman over a period beginning on 21 July 2000 and ending on 2 July 2002.

According to the applicant, all the events that occasioned the delay were absolutely beyond the control of the applicant. Thus, it is submitted that the Industrial Court award of 44 months of back wages from the date of dismissal on 9 Novermber 1996 till the last day of hearing on 2 July 2000 is patently excessive and unreasonable.

Without doubt, there is a considerable delay in concluding this case before the Industrial Court. But it cannot be a reason to reduce further an award of the Industrial Court. This is because as submitted by the first respondent that none of the causes of the delays as raised by the applicants were caused by the first respondent. Like the applicant, the first respondent must be equally frustrated with the delays. She also has had to patiently wait for the case to be disposed of. In any event, the Industrial Court has already reduced the back wages due to first respondent by 30% on account of her post-dismissal employment. Therefore, I am of the view, there is no valid reasons in law for the applicant to seek this court to further reduce the amount of back wages payable to the first respondent on the grounds raised by the applicant.

Conclusion

The learned Chairman's finding that the first respondent had been constructively dismissed in this case is a finding of fact. The finding is based on the totality of evidence adduced before him. To me, the learned Chairman had scrutinized the evidence of both parties and applied the law to the facts and made a reasonable conclusion. It is not the task of this court to scrutinize every piece of evidence adduced before the Industrial Court and to make another finding of fact. As stated by the Supreme Court in *Malayan Banking Berhad v. Association of Bank Official, Peninsular Malaysia & Anor.* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 that the tasks of fact-finding fall within the jurisdiction of the Industrial Court. What is important for me to consider is whether the findings of the Industrial Court is well supported by evidence adduced in the course of trial and it has not taken irrelevant matters into consideration in making the award. I find that the Industrial Court findings are well supported by evidence and it has not taken irrelevant matters into consideration.

In conclusion, I am of the view that the Industrial Court award does not suffer any of the infirmities of "illegality", "irrationality" or "procedural impropriety". The award was neither perverse nor unreasonable. The grounds of challenge raised by the applicant do not disclose any error of law warranting intervention by this court by way of judicial review.

Accordingly, I have no alternative but to dismiss the applicant's application with costs.